FILE
JUN 3 19
CLERK

No. 80-2035

In the Supreme Court of the United States

OCTOBER TERM, 1980

ELECTRONIC DATA SYSTEMS CORPORATION, IRAN,
PETITIONER

v.

THE SOCIAL SECURITY ORGANIZATION OF THE GOVERNMENT OF IRAN, THE MINISTRY OF HEALTH AND WELFARE OF THE GOVERNMENT OF IRAN, THE GOVERNMENT OF IRAN, DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

American International Group v. *Islamic Republic of Iran*, No. 80-1779 (D.C. Cir. May 22, 1981) 4, 6

Blount Brothers Corp. v. *Government of Iran*, Civ. Action No. C 79-1442V (W.D. Wash. May 7, 1981) 4-5

Chas. T. Main International, Inc. v. *Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. May 22, 1981) 4, 6

Daniel, Mann, Johnson & Mendenhall, et al. v. *Regan*, No. C V 81-1101 LEW (C.D. Cal. May 28, 1981) 4, 6

Liberty Mutual Ins. Co. v. *Wetzel*, 424 U.S. 737 9

New England Merchants National Bank v. *Iran Power Generation & Transmission Co.*, Nos. 740, 1049-1144, 1145-1224, 1225-1227 (2d Cir. Apr. 9, 1981) 6

Security Pacific National Bank, et al. v. *Government and State of Iran*, No. CV 79-4661-RJK (C.D. Cal. Apr. 30, 1981) ... 5, 6, 8

Unidyne Corp. v. *Islamic Republic of Iran*, No. 80-1029-A (E.D. Va. Mar. 30, 1981) 5

United States v. *Nixon*, 418 U.S. 683 9

United States v. *Pink*, 315 U.S. 203 7

United States v. *The Schooner Peggy*, 5 U.S.C. (1 Cranch) 103 7

Page

Treaty, statutes, rule and regulations:

Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853 2

Foreign Sovereign Immunities Act, 28 U.S.C. 1610(d)(1) 2

International Emergency Economic Powers Act, 50 U.S.C. (Supp. III) 1701 *et seq.* 9

28 U.S.C. 1252 9

28 U.S.C. 1291 9

Sup. Ct. R. 18 1

31 C.F.R. (1980):

- Section 535.201 ..... 2, 7
- Section 535.203(a) 2, 3
- Section 535.203(b) 3
- Section 535.203(e) 7
- Section 535.310 ..... 2, 7
- Section 535.502 *et seq.* 2
- Section 535.504 7
- Section 535.805 3

31 C.F.R. 535.213(c) (46 Fed. Reg. 26477 (May 13, 1981)) 3

31 C.F.R. 535.218(a) (46 Fed. Reg. 14334 (Feb. 26, 1981)), as amended by 46 Fed. Reg. 26477 (May 13, 1981) 3

Page

Miscellaneous:

Executive Order No. 12170, 44 Fed. Reg. 65729 (1979) 2

Ececutive Order No. 12279, 46 Fed. Reg. 7919 (1981) 3

Executive Order No. 12294, 46 Fed. Reg. 14111 (1981):

Section 1 6
Section 8 3

R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 9

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2035

ELECTRONIC DATA SYSTEMS CORPORATION, IRAN,
PETITIONER

v.

THE SOCIAL SECURITY ORGANIZATION OF THE GOVERNMENT OF IRAN, THE MINISTRY OF HEALTH AND WELFARE OF THE GOVERNMENT OF IRAN, THE GOVERNMENT OF IRAN, DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner's extraordinary request for certiorari before judgment should be denied. Because the assets subject to petitioner's attachment are not covered by the President's Executive Order requiring the transfer to the Federal Reserve Bank of New York of Iranian assets held in domestic banking institutions for subsequent transfer out of the country by July 19, 1981, this case plainly is not one of "such imperative public importance as to justify the deviation from normal appellate practice," nor one that "require[s] immediate settlement in this Court" (Sup. Ct. R. 18).

1. Pursuant to an Executive Agreement with Iran, entered into to resolve the grave international crisis resulting from the seizure of American hostages, the United States is required to transfer out of the country, on or before July 19, 1981, certain Iranian assets held by domestic banking institutions. However, the United States has taken the position that under the Agreement, assets subject to attachments obtained prior to the President's Executive Order of November 14, 1979, blocking Iranian assets in this country need not be transferred to Iran. Petitioner's attachment of Iranian assets held in the Marine Midland Bank in New York was obtained in the United States District Court for the Southern District of New York before November 14, 1979. Accordingly, the assets secured by that attachment need not be transferred to Iran by July 19, 1981, pursuant to the Executive Order of the President and implementing Treasury Department regulations.[1]

a. After the American hostages were seized, the President, on November 14, 1979, issued Executive Order No. 12170 (44 Fed. Reg. 65729) blocking all property of the Government of Iran, its controlled entities, and the Central Bank of Iran. Implementing Treasury Department regulations provided that any attachment of such property occurring after the blocking order was invalid without a license from the Secretary. See 31 C.F.R. 535.201, 535.203(a),

---

[1]The Iranian respondents argued in the district court in New York and on appeal to the Second Circuit that, quite aside from the President's order freezing Iranian assets, the pre-judgment attachment of assets was barred by the Foreign Sovereign Immunities Act, 28 U.S.C. 1610(d)(1), and that the immunity from pre-judgment attachment had not been waived by the Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853. That issue, which concerns the validity of the attachment in New York, is not before the Fifth Circuit in the instant case and, in any event, does not bear directly on the measures taken by the President to resolve the hostage crisis.

535.310, 535.502 *et seq.* (1980). Pursuant to these regulations, a number of entities having claims against Iran obtained pre-judgment attachments of Iranian funds. Such licenses were expressly made revocable at any time. 31 C.F.R. 535.805 (1980). The regulations did not, however, require a license for a pre-judgment attachment, such as that of petitioner in this case, which was obtained prior to the date of the blocking order. 31 C.F.R. 535.203(a) and (b) (1980).

b. Upon settlement of the hostage crisis, President Carter issued Executive Order No. 12279 (46 Fed. Reg. 7919 (1981)) (Pet. App. A-121 to A-123), which revoked all licenses obtained under the asset control regulations for pre-judgment attachments of Iranian assets held by domestic banking institutions and required the transfer of such assets to the Federal Reserve Bank in New York, for subsequent transfer to Iran by July 19, 1981.[2] See also 31 C.F.R. 535.218(a) (46 Fed. Reg. 14334 (Feb. 26, 1981), as amended by 46 Fed. Reg. 26477 (May 13, 1981). However, consistent with the United States' interpretation of the Agreement with Iran, the Treasury Department regulations do *not* require the transfer to the Federal Reserve Bank of assets subject to a pre-judgment attachment that was acquired prior to the blocking order of November 14, 1979. 31 C.F.R. 535.213(c) (46 Fed. Reg. 26477 (May 13, 1981)). Because petitioner's pre-judgment attachment was obtained in the Southern District of New York prior to the blocking order of November 14, 1979, these regulations, like the Agreement and Executive Orders they implement, do not require the transfer of assets attached by petitioner in order to fulfill the United States' commitment to transfer Iranian assets held by domestic banks by July 19. Because petitioner's attachment may lawfully remain in effect beyond that

---

[2]Executive Order No. 12279 was ratified by President Reagan in Section 8 of Executive Order No. 12294 (46 Fed. Reg. 14111, 14112 (1981)) (Pet. App. A-126).

date (assuming that it is otherwise valid, see note 1, *supra*), this case does not present the question of the President's authority to revoke licenses for pre-judgment attachments and order the transfer of Iranian property—the principal question that must be resolved by July 19 in order to clear the way for the transfer of assets held by domestic banks. As a result, there is no need for the extraordinary measure of certiorari before judgment in this case.[3]

c. The validity of the President's action revoking licenses for pre-judgment attachments and requiring the transfer of Iranian assets has, to date, been unanimously sustained by the lower courts. See *Chas. T. Main International, Inc.* v. *Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. May 22, 1981);[4] *American International Group* v. *Islamic Republic of Iran*, No. 80-1779 (D.C. Cir. May 22, 1981) (two consolidated cases); *Daniel, Mann, Johnson & Mendenhall, et al.* v. *Regan*, No. CV 81-1101 LEW (C.D. Cal. May 28, 1981) (two consolidated cases); *Blount Brothers Corp.* v. *Government of Iran*, Civ. Action No. C 79-1442V

---

[3]Petitioner seeks to avoid this obvious point by arguing that it is barred from executing its judgment obtained in the district court in Texas on the assets subject to attachment in New York. It is true that execution of the judgment on the assets attached in New York would require a license from the Treasury under the asset control regulations. But if the Treasury Department finally denies such a license, the proper place for petitioner to challenge that action would be in the United States District Court for the Southern District of New York, where the funds are located and where it obtained an order of attachment, not in the instant case. In any event, the question whether petitioner will at some later date be able to execute on the judgment it obtained in Texas—even assuming that judgment is valid—is not involved in the pending Fifth Circuit case and does not warrant immediate review under the extraordinary procedure of certiorari before judgment.

[4]The First Circuit had entered an injunction pending appeal prohibiting the transfer of Iranian assets. Upon deciding the appeal in favor of the United States, that court directed that its injunction be vacated as of June 1, 1981. The appellant allowed its security against Iranian assets provided by the injunction to lapse without seeking a further stay from the First Circuit or this Court.

(W.D. Wash. May 7, 1981) (appeal pending);[5] *Unidyne Corp.* v. *Islamic Republic of Iran,* No. 80-1029-A (E.D. Va. Mar. 30, 1981); *Security Pacific National Bank, et al.* v. *Government and State of Iran,* No. CV 79-4661-RJK (C.D. Cal. Apr. 30, 1981) (appeal pending in one of four consolidated cases).

In light of these uniform judicial holdings, the United States intends, in the next few days, to renew its request in the hundreds of remaining cases involving claims against Iran that the courts immediately vacate the attachments against Iranian assets that must be transferred by July 19, 1981. Claimants whose attachments have been or will soon be vacated may well seek review in this Court.[6] Indeed, should the government's position be rejected by a court of appeals, or should the lower courts not act in the near future to free assets for transfer to the Federal Reserve Bank in New York for a subsequent transfer out of the country, the United States would promptly bring a case to this Court. For the reasons explained above, however, this case does not present the issue that is critical to the release of Iranian assets by July 19.

The United States believes that the great bulk of assets required to be transferred by July 19, 1981, are located within the First, Second, Ninth, and District of Columbia Circuits. The President's authority to revoke licenses for attachments of Iranian assets and order the transfer of those

---

[5]On June 1, 1981, the United States Court of Appeals for the Ninth Circuit, citing "the broad executive powers conferred by the International Economic Emergency [redacted] Powers Act," denied Blount Brothers' request for a stay pending appeal of the district court's order vacating its attachment as of June 6, 1981.

[6]As discussed above, the First and District of Columbia Circuits have sustained the President's authority to revoke licenses for attachments and order the transfer of Iranian assets. The claimants in these cases are now free to seek review in this Court.

assets has been explicitly upheld by the District of Columbia and First Circuits, and the Ninth Circuit has denied a stay pending appeal, which had the effect of allowing claimant's attachment to terminate. See pages 4-5 and note 5, *supra*. The government shortly will request that the Second Circuit direct the vacation of attachments in 96 consolidated cases now pending in that circuit. See *New England Merchants National Bank* v. *Iran Power Generation & Transmission Co.*, Nos. 740, 1049-1144, 1145-1224, 1225-1227 (2d Cir. Apr. 9, 1981). A prompt decision by the Second Circuit in the consolidated cases, should one be forthcoming, will control numerous other cases pending in the Southern District of New York. A prompt order from this Court denying certiorari before judgment in the instant case would prevent the Second Circuit and other lower courts from deferring a ruling on the government's request to vacate post-blocking order attachments on the mistaken assumption that this case presents that issue.

2. Pursuant to the Agreement with Iran, President Reagan has suspended claims against Iran that may be presented to the Iran-United States Claims Tribunal. Executive Order No. 12294, Section 1 (46 Fed. Reg. 14111 (1981)) (Pet. App. A-124 to A-125). The Agreement with Iran provides for the establishment of an escrow account, to be funded with the assets required to be transferred by July 19 (up to a total of $1 billion), for the payment of claims where the Tribunal enters an award against Iran. The President's authority to suspend claims pending their submission to the arbitral tribunal has likewise been sustained in the lower courts. *Chas. T. Main International, Inc.* v. *Khuzestan Water & Power Authority, supra; American International Group* v. *Islamic Republic of Iran, supra; Security Pacific National Bank, et al.* v. *Government and State of Iran, supra; Daniel, Mann, Johnson & Mendenhall, et al.* v. *Regan, supra.*

To be sure, the United States has argued in the present case that the final judgment in favor of petitioner was entered in violation of the applicable Iranian Asset Control Regulations (see 31 C.F.R. 535.201, 535.203(e), 535.310, 535.504 (1980)), and that these regulations together with the law resulting from the international agreement with Iran require the vacating of the preliminary injunction and the final judgment and a stay of further proceedings in this case. See *United States* v. *Pink*, 315 U.S. 203 (1942); *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). This Court may be asked at some point to decide whether the President has the authority to suspend claims against Iran (including the claim on which petitioner has a purported final judgment) in order to provide for their referral to arbitration under the terms of the Agreement. But at least in the absence of a case that also presents the issue of whether the President can lawfully terminate post-blocking order attachments in fulfillment of the overall settlement arrangement, an issue not presented here, the question of the President's authority to suspend claims pending referral to arbitration should not be decided through the extraordinary procedure of a petition for a writ of certiorari before judgment.[7]

3. The present posture of this case makes it a particularly inappropriate candidate for certiorari before judgment in any event.[8] The Fifth Circuit heard oral argument in this

---

[7]It is particularly unnecessary to decide that issue in this case, because the assets on which petitioner would execute should its judgment be held to be valid will not be removed from the United States on July 19.

[8]The present case is unique in a number of respects that make it an inappropriate vehicle for addressing the President's powers to provide for arbitration of claims generally. Petitioner was one of the very few claimants that instituted suit and obtained attachments prior to the November 14, 1979, blocking order, and was one of the few claimants

case on April 20, 1981. Because the attachment in New York that would secure a final judgment in this case is unaffected by the applicable Executive Orders and regulations, the United States did not explicitly urge the Fifth Circuit to decide this case expeditiously,[9] nor did petitioner.

Moreover, the district court's findings of fact and conclusion of law regarding the Agreement with Iran and the President's authority to implement that agreement were "made only for purposes of a determination as to [petitioner's] application for a preliminary injunction and do not represent final Findings of Fact and Conclusions of Law with respect to this proceeding" (Pet. App. A-2). The preliminary injunction was entered while the present Administration was conducting its review of the Agreement with Iran, prior to President Reagan's February 24, 1981, Executive Order suspending claims, and without the benefit of a brief from the United States setting forth the legal authority for the Executive's actions (Pet. App. A-33). See also *Security Pacific National Bank, et al.* v. *Government and State of Iran, supra,* slip op. 9-10. The instant case is still pending in the district court on the government's motion for summary judgment or in the alternative to dissolve the preliminary injunction, and on petitioner's cross-motion for summary judgment and a permanent injunction preventing the transfer of assets needed to secure the judgment in petitioner's favor. Therefore, because *neither* court below has finally passed on the validity of the overall settlement arrangement or even preliminarily passed on President

---

that obtained a judgment against Iran, albeit after the blocking order. The vast bulk of the over 400 Iranian cases involve suits filed, and attachments obtained, after November 14, 1979, and have not gone to judgment.

[9]It is for that reason that the Justice Department letter, referred to by petitioner (Pet. 5), seeking prompt decisions from a number of other circuits was not sent to the Fifth Circuit.

Reagan's Executive Order or implementing Treasury regulations,[10] certiorari before judgment would be especially inappropriate in this case.

Finally, petitioner has urged the Fifth Circuit to dismiss the government's appeal from the preliminary injunction, because, in its view, the district court held the International Emergency Economic Powers Act, 50 U.S.C. (Supp. III) 1701 *et seq.*, unconstitutional and the court of appeals therefore lacks jurisdiction to hear the government's appeal. See 28 U.S.C. 1252, 1291.[11] Because petitioner continues to assert that the court of appeals does not have jurisdiction of the government's appeal (Pet. 5 n.3) and that the appeal from the preliminary injunction therefore is not properly "in" the court of appeals (see *United States* v. *Nixon*, 418 U.S. 683, 690 (1974)), if petitioner were correct this Court also would lack jurisdiction to decide the issue involved in the grant of the preliminary injunction. See *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976); R. Stern & E. Gressman, *Supreme Court Practice* 54-55 (5th ed. 1978). The petition for certiorari before judgment to consider the issues raised by the preliminary injunction should be denied for this reason alone.

It is therefore respectfully submitted that the petition for a writ of certiorari before judgment should be denied.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1981

---

[10]For example, the preliminary injunction entered by the district court was based in part on the critical assumption that the assets subject to the attachment obtained by petitioner in New York were required to be transferred immediately to the Federal Reserve Bank (Pet. App. A-22 to A-23). As we have explained, that assumption was in error.

[11]The government opposed petitioner's motion to dismiss its appeal. That motion is still pending in the court of appeals.